IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LARRY JOSEPH DAVIS, Petitioner.	)	2 CA-CR 2006-0247-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021517

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By John F. Palumbo
Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, petitioner Larry Joseph Davis was convicted of sale of a narcotic drug and sentenced to a mitigated, six-year prison term. This court affirmed the conviction and sentence on appeal, rejecting his claims that the trial court had erred by

denying his requests for a *Willits*[1] instruction and declaration of a mistrial based on purportedly misleading statements made by the prosecutor during closing argument. *State v. Davis*, No. 2 CA-CR 2003-0129 (memorandum decision filed Sept. 28, 2004). In October 2004, Davis filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., followed by a petition in which he claimed admission of a police officer's deposition transcript at trial violated *State v. Alvarado*, 158 Ariz. 89, 761 P.2d 163 (App. 1988), and his confrontation rights under the Sixth Amendment of the United States Constitution. The trial court denied relief, and this petition for review followed.

¶2 We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 180, 800 P.2d 1260, 1288 (1990). The court did not abuse its discretion here.

¶3 Relying primarily on *Alvarado*, Davis argued below, much as he does on review, that because he did not knowingly, voluntarily, and intelligently waive his rights under the Confrontation Clause of the Sixth Amendment, the introduction at trial of the officer's deposition, which was taken in his absence after defense counsel had waived his presence, violated those rights. The trial court denied relief, finding *Alvarado* distinguishable because, there, the defendant had objected to the deposition of a witness being taken by defense counsel in his absence, and the trial court had permitted it because the defendant was incarcerated. Here, the trial court concluded, Davis had conferred with

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

counsel about the deposition being taken without him and had "voiced no apparent objection." The trial court further found that Confrontation Clause violations are reviewed under a harmless error standard and that, here, even assuming there had been such a violation, it "was harmless in light of the evidence presented, including but not limited to the testimony of [another officer] that Petitioner was the individual that sold the officers crack cocaine."

¶4 We note at the outset this issue could have been raised on appeal and, therefore, arguably was precluded. *See* Ariz. R. Crim. P. 32.2. But, because of the nature of the claim—that Davis's Sixth Amendment rights were violated and could not be deemed waived without a knowing, voluntary, and intelligent waiver of those rights—we have reviewed whether the trial court abused its discretion in denying relief on the merits of the claim. *See Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002) (whether claim is of "'sufficient constitutional magnitude'" that it cannot be waived without a knowing, voluntary, and intelligent waiver depends on nature of right at issue), *quoting* Ariz. R. Crim. P. 32.2 cmt. We conclude it did not.

¶5 Even assuming, without deciding, the trial court erred when it found Davis had waived his right to appear at the deposition and concluded this case is therefore distinguishable from *Alvarado*, Davis is not entitled to relief. Davis concedes a Confrontation Clause violation is subject to a harmless error review. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 1438 (1986); *State v. Medina*, 178 Ariz. 570,

577, 875 P.2d 803, 810 (1994); *State v. King*, 212 Ariz. 372, ¶ 36, 132 P.3d 311, 319 (App. 2006). "[E]rroneously admitted evidence is harmless in a criminal case only when the reviewing court is satisfied beyond a reasonable doubt that the error did not impact the verdict." *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000). As the trial court noted in its minute entry denying relief, defense counsel attended the officer's deposition and had the opportunity to cross-examine him. Additionally, the trial court found any error harmless after it considered the evidence that had been presented at trial. Davis has not persuaded us on review that the trial court abused its discretion in reaching that conclusion, given the record before us and the evidence presented at trial, which we summarized in our September 2004 memorandum decision in Davis's appeal.

¶6 We grant the petition for review, but for the reasons stated herein, we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge